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CAN A MAINTENANCE ORDER UNDER S. 488, CRIMINAL PROCEDURE CODE, BE CANCELLED WHEN REUNION OF THE PARTIES TAKES PLACE?

The Criminal Procedure Code, as it now stands, does not provide for the cancellation of a maintenance order in many of the possible contingencies that may crop up during the life of a quarrelling couple. Whether such an order could be cancelled at all and what exactly the Court's powers are under S. 489, cl. 1 of the Criminal Procedure Code when the wife returns and lives with the husband, have come up for judicial determination in several cases and there is a remarkable conflict of opinion on the matter. Though the problem appears to be simple in its form, yet, Courts have entertained two sets of views on the matter. In view of the wording of S. 489, cl. (1) itself, one has to come to the conclusion that the legislature did not contemplate such possibilities on the part of the married couples. when once they quarrelled. After the passing of a maintenance order in favour of a wife, the same can be cancelled under two sets of circumstances:

(1) if the wife lives in adultery, etc., as in S. 488, cl. 5 and

(2) if a decree of a competent Civil Court comes into existence as in S. 489, cl. 2.

But courts not content with these provisions have tried to extend their jurisdiction in this direction by seeking to apply S. 489, cl. 1 of the Criminal Procedure Code to cases of reunion and hence the question regarding the Court's powers to cancel such a maintenance order under S. 489, cl. 1 arises.

2. The provision of the statute as embodied in S. 489, cl. 1 is as follows:—

"On proof of a change in the circumstance of any person receiving

under S. 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance the monthly rate of 100 rupees in the whole be not exceeded."

In this connection we must note that the dictionary meaning as found in Webster (Ed. 1916,) p. 64 of the word "alter" is as follows:—

(1) To change in one or more respects but without destruction of the identity of the thing changed.

(2) To make a thing different without changing it to something else. It also appears therefore that the change mentioned in S. 489, cl. 1 relates to the change in the pecuniary circumstances of the parties and not to the change in their status. Further, this section preceded by the word wife or child and followed by the limitation as to the amount of maintenance that can be awarded, is clearly indicative of the above view. (*See* In the matter of *Din Muhammad*[1] and *Shah Abu Ilyas* v. *Ulfat Bibi*[2].)

3. If the above deduction is correct, it is submitted that the decision in *Meenatchi Ammal* v. *Karuppuana Pillai* alias *Muthuswami Pillai*[3], where it has been held that the word 'alteration' in cl. (1) of S. 489, Criminal Procedure Code, includes cancellation as well and therefore the maintenance order can be reduced to nothing also under this clause of S. 489, requires reconsideration. There the question arose whether a female child who had got a maintenance order in her favour was to lose the same when she got married and His Lordship held that she lost the same if her husband was found to be able to maintain her.

4. In this connection the case reported in *U Po Shein* v. *Ma Sein Mya*[4], may also be noted where it is held in a case of reunion after a maintenance order, that the Court has got jurisdiction to cancel the same. But the reasoning is different from that in *Meenatchi Ammal* v. *Karuppana Pillai* alias *Muthuswami Pillai*[3]. His Lordship in the Rangoon case observes in p. 462 thus:

"The provisions of S. 489 (1) would appear not to apply to a case like the present. At the same time it would appear unreasonable that a wife,

1. (1882) I.L.R. 5 All. 226. 2. (1896) I.L.R. 19 All. 50 (F.B.).
3. (1924) 48 M.L.J. 183: I.L.R 48 Mad. 503.
4. (1930) I L.R 8 Rang. 460.

once she has succeeded in obtaining an order under S. 488, Criminal Procedure Code, should be able permanently to hold this order *in terrorem* over her husband after a *bona fide* reunion. I would venture to say that the continuance of such a state of affairs would not assist the happiness of such a reunion. Since the original order of the Magistrate is conditional on neglect or refusal by the husband to maintain the wife a *bona fide* reunion must be interpreted as removing the basis on which the order of the Magistrate rests and as therefore vacating the order. . . . . If there was subsequent desertion by the husband it was open to the wife to make a fresh application under S. 488, Cr. P. Code."

Hence His Lordship is of the opinion that the Court should cancel the order of maintenance if there is a *bona fide* reunion.

5. The contrary view taken in *Kanagammal* v. *Pandara Nadar*[1], *Parul Bala Debi* v. *Satish Chandra Bhattacharjee*[2], *Narayanaswami Mudali* v. *Mangayarkarasiammal*[3], *Mt. Zauhra Bi* v. *Muhammad Yusaf*[4] and *John P.E. Coelho* v. *Mrs. Blanche Coelho*[5] *Pearey Lal* v. *Mt. Naraini*[6] is based on what appears to be, with respect, the more logical and common sense view of S. 489, cl. (1), namely, that the maintenance order cannot be cancelled under this section—S. 489, cl. (1). His Lordship Curgenven, J., observes in *Kanagammal* v. *Pandara Nadar*[7] that the mere fact that a wife has returned to live with her husband will not have the effect of cancelling the previous order and the Code makes no provision for the cancellation of the order upon such an event occurring, and hence held that a temporary reunion between the husband and his wife had no effect of bringing the old order to an end automatically and the wife is still entitled to claim maintenance in spite of the temporary reunion. The said Judge has affirmed his own view in *Kanagammal* v. *Pandara Nadar*[7] in a later case in *Narayanaswami Mudaliar* v. *Mangayarkarasiammal*[8]. It is not clear whether the decision in *Meenatchi Ammal* v. *Karuppana Pillai* alias *Muthuswami Pillai*[9] was brought to the notice of the learned Judge in *Kanagammal* v. *Pandara Nadar*[7].

6. There is yet another view taken in *Parul Bala Debi* v. *Satish Chandra Bhattacharjee*[2]. This decision is very

1. (1926) 52 M.L.J. 176: I.L.R. 50 Mad. 663.
2. (1923) 37 C.L.J. 180: 75 I.C. 529.
3. A.I.R. 1927 Mad. 1148.
4. A.I.R. 1930 Lah. 1043.
5. A.I.R. 1936 Nag. 228.
6. (1935) A.I.R. 1935 All 977.
7. (1926) 52 M.L.J. 176: I.L.R. 50 Mad. 663 at 664.
8. A.I.R. 1927 Mad. 1148.
9. (1924) 48 M.L.J. 183: I.L.R. 48 Mad. 503.

instructive and is relied on by His Lordship Mr. Justice Curgenven in *Kanagammal* v. *Pandara Nadar*[1]. In that case their Lordships Sanderson and Panton, JJ., of the Calcutta High Court, observe that a mere temporary stay of this kind though it may have the effect of suspending the operation of the maintenance order, yet had not the effect of cancelling it in the way in which it could be cancelled under S. 488, cl. 5.

7. The above cases deal with a wife who temporarily returns to her husband, lives with him and then wants to enforce the old order for maintenance. In one case she bore a child to the husband and then went away. (See *Narayanaswami Mudali* v. *Mangayarkarasiammal*[2]) But where a wife permanently returns to the husband, what is to become of the previous maintenance order? Looked at from that point of view, the sections of the Criminal Procedure are not wide enough to provide for such a possibility. If at all the defect is to be remedied it can be done only by the legislature. The observation of Curgenven, J., in *Kanagammal* v. *Pandara Nadar*[1] is pertinent and covers this possibility also to a certain limited extent. The learned Judge observes that if a wife returns to live with her husband, it would be open to the Court to decline to enforce the order, under S. 490, whether or not it would have the power in the absence of any statutory provision to cancel it.

8. It is high time that the legislature seeks to settle this matter once for all by enacting a provision giving legislative sanction for the suspension of the maintenance order so long as the parties remain reunited and the revival, as pointed out by the learned Judges of the Calcutta High Court in *Parul Bala Debi* v. *Satish Chandra Bhattacharjee*[3], of the order as soon as they fall out once again. Therefore it is suggested that the language in S. 489, cl. 1 should be so altered as to cover the above cases.

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1. (1926) 52 M.L.J. 176: I.L.R. 50 Mad. 663 at 664.
2. A.I.R 1927 Mad. 1148.
3. (1923) 37 C.L.J. 180: 75 I.C. 529.

SUMMARY OF ENGLISH CASES.

Noble Lowndes and Partners *v.* Hadfields, Ltd., (1939) 1 Ch. 569.

Practice—Action commenced in the name of a firm—Objection that firm not registered and so not entitled to sue—Application by the person who entered into contract to amend the plaint and to be substituted as the plaintiff—When to be allowed.

An action was commenced by *L* in the name of a firm of five persons, in the honest belief that he was entitled to sue in the firm name. Defendants in the course of the proceedings discovered that the firm was not registered and not entitled to sue. *L* then sought by a summons to be substituted as sole plaintiff and the defendants took out a summons to strike out the statement of claim.

Held, an action by or against a firm notwithstanding R.S.C. O 43-A, remains an action by or against the individual members of the firm and what is asked for not being substitution of a living person for a non-existent entity but merely for striking out the names of all the plaintiffs except one and to leave that one as sole plaintiff, the amendment must be allowed, but as the mistake was plaintiffs the costs of the action up to date and of the summons must be paid by him.

In re: Farmer: Nightingale *v.* Whybrow, (1939) 1 Ch. 573.

Will—Legacies and annuities—Abatement—How to be effected—Rights of annuitants and residuary legatee.

Where an estate was insufficient to pay the legacies and annuity in full and there had to be an abatement the question arose as to how the abatement was to be effected in relation to the annuity having regard to the direction to set aside a sum, the income of which should be sufficient to meet it, with a gift over of the sum so set aside.

Held, the annuitant is entitled to have paid over to her the capital value of her annuity, when abated, if necessary. If after payment of the legacies and the actuarial value of the annuity in full any surplus remained, that surplus was payable to the beneficiaries who were to take the annuity found on the death of the annuitant. The surplus was not payable to the residuary legatee.

In re Colin Cooper: Le NeveFoster *v.* National Provincial Bank, (1939) 1 Ch. 580.

Wills—Legacy to trustees on secret trusts—Whether trust or testamentary disposition—Essentials of valid trust.

The testator made a will on 13th July, 1931. On 10th February, 1938, he made another will revoking the earlier one and by a clause bequeathed to his executors £5,000, upon trusts which he had already communicated to them. Shortly after, the testator, while in Africa on a shooting expedition, was taken ill and brought down to a hospital in Kenya where on 27th March, 1938, he made a will cancelling the will of 10th February, 1938, and reviving the will of 13th July, 1931, except as to the sum of £5,000 bequeathed to trustees which was increased to £10,000, they knowing the testator's wishes. On 29th March the testator died, and the question arose whether the gift of the additional sum of £5,000 for the secret trust was valid.

Held, the main principle which is laid down is that communication of the purpose for which the legacy is given to the legatee and acquiescence by the legatee in that purpose or promise on his part to carry it out are the essential matters which render valid a legacy for a secret trust [*Blackwell* v. *Blackwell*, (1929) A.C. 318, followed]. It is a matter of trust and not testamentary disposition. As the bequest of the second £5,000 was not communicated and accepted by the trustees it falls back into the residue.

WALLINGTON *v.* TOWNSEND, (1939) 1 Ch. 588.

Contract for sale of land—Vendor's default not due to defect in title—Purchaser's right to damages—Nature and extent.

Where the vendor's failure to carry out the contract is not due to a defect in vendor's title, the damages are at large and the Court can give such damages as according to general principles it thinks right. When there was no evidence that the property was worth more than the purchase price the purchaser is entitled to return of his deposit with interest at 4 per cent. by way of damages in respect of the loss of the use of the deposit, damages in respect of the costs of approving and executing the contract, and damages in respect of the costs of investigating the title and preparing the conveyance and searches.

In re A DEBTOR, (1939) 1 Ch. 594.

Bankruptcy Act, (1914), *S.* 130 (2) *and Bankruptcy Rules* (1915) *r.* 303—*Administration of a deceased insolvent's estate—If can be ordered before a legal personal representative of the deceased debtor has been appointed.*

Until a legal personal representative has been constituted the Court has no power to make an order for the administration in bankruptcy of a deceased debtor's estate.

LAYCOCK *v.* FREEMAN HARDY AND WILLS, (1939) 2 K.B. 1.

Income-tax Act (1915), *Schedule D, Cases I and II, rule* 11, *sub-rule* (2)—*Acquisition of wholesale subsidiary companies by holding companies—Acquiring company selling the goods direct to public—If company succeeded to the wholesale business.*

A retail boot and shoe business was carried on by the respondent company who also owned the whole of the capital of two subsidiary wholesale manufacturing companies whose whole output they purchased. On a voluntary liquidation of the two subsidiary companies the business was assigned to the respondent company and goods manufactured by them were sold direct to the public from respondent company's shops.

Held, the wholesale business of the subsidiary companies ceased and the respondent company did not succeed to the wholesale business under the Income-tax Act, 1918.

MAHON *v.* OSBORNE, (1939) 2 K.B 14.

Negligence—Surgeon and patient—Swab left in patient on operation—Res ipsa loquitur—*If applicable—Degree of care required.*

In an action by the mother of a deceased patient against the surgeon and staff for damages for negligence in leaving a swab in the patient which necessitated a second operation which resulted in death, the plaintiff contended that the doctrine of *res ipsa loquitur* was applicable.

Held, a decision of actionable want of care cannot be justly reached without taking due account of all the circumstances of the particular operation and the legal standard of care cannot be set higher than that of the ordinarily good and careful practitioner in those circumstances and whether or not there was failure to exercise such skill and care must depend on the evidence in the particular case.

Per *Mackinnon and Goddard, L.JJ.,* (*Scott, L.J.,* dissenting) the doctrine of *res ipsa loquitur* applied and the burden of proof was on the defendants.

Per *Scott and MacKinnon, L.JJ.,* (*Goddard, L.J.*; dissenting).—There was no general rule of law requiring a surgeon after an operation to make sure that no swab was left in the patient.

[Allowing newspaper reports of cases to be cited criticised.]

UNITED AUSTRALIA, LTD. *v.* BARCLAYS BANK, LTD., (1939) 2 K.B. 53.

Election—Commencement of action based on contract—Waiver of tort—Subsequent action on same facts based on tort against third party—If barred.

In November, 1934, certain debtors sent to the plaintiff company an order cheque for £1,900. *E*, the Secretary of the plaintiff company, without authority, endorsed it, in the name of the plaintiff company, in favour of M. F. G. Company. M. F. G. paid the cheque to their bankers, the defendants who collected the money. It was a simple case of conversion by *E* and M. F. G., and if the matter stood there not only M. F. G. but also the defendants would be liable in conversion for the amount of the cheque. On May, 13, 1935, plaintiffs issued a writ against M. F. G. for the £1,900 as money lent or as money had and received to the plaintiff's use. M. F. G. went into liquidation and a proof by the plaintiff for the amount was not admitted as the funds available were non-existent or trivial in amount. On November, 8, 1937, the plaintiffs began the present action against the defendant claiming £1,900 as damages for conversion of the cheque.

Held, the election to institute the proceedings against M. F. G. for money had and received waiving the tort prevents the plaintiff from reviving the claim in tort so as to pursue the remedy in tort against the defendant bank.

NATIONAL REAL ESTATE AND FINANCE CO., LTD. *v.* HASSAN, (1939) 2 K.B. 61.

Practice—R. S. C., O. 25, r. 2—Preliminary issue—Point of law—Hearing and disposal before trial—Proper procedure.

Where advantage is sought to be taken of the procedure for hearing and disposal of a "point of law" before the trial, care should be taken that a real point of law is being raised and there should be a clear definition of what the point of law raised is, and it is only in those circumstances that the Court can properly deal with the matter and that the procedure under R. S. C., O. 25, r. 2 is any advantage whatsoever.

WHITHAM *v.* BULLOCK, (1939) 2 K.B. 81.

Lease—One assignee of part of a lease forced under stress of liability to distress to pay the rent payable by the assignee of another portion—Right to recoupment.

The defendant an assignee of a portion of leasehold property refused to pay rent as the plot assigned to him had been cleared under the Housing Acts. The plaintiff, to whom the other portion had passed by assignment was forced to pay the rent for the whole property under threat of distraint by the lessor. The plaintiffs then claimed to be re-imbursed the defendant's share of the rent so paid.

Held, though the plaintiffs were not liable to be sued for the rent due by the defendant, the plaintiffs were entitled to sue defen-

dants for reimbursement of the defendant's portion of the rent paid under stress of liability to distress.

REX *v.* MILLS, (1939) 2 K.B. 90.

Criminal trial—Jury—Acquiescing of minority in majority verdict—Validity of verdict.

In an appeal against conviction on the ground that the recorder instructed the jury that he could not release them until they had reached a verdict.

Held, it is of the greatest importance indeed it is fundamental that jury should not be led either by a desire to acquiesce or to avoid eccentricity, or to save time and trouble to represent themselves as holding an opinion which they do not in fact hold and the conviction must be quashed.

PAGET *v.* MAYO, (1939) 2 K.B. 94.

Road Traffic Act (1930), *S.* 22—*Accident causing damage to stone wall and the vehicle itself—Failure of driver to report to police—If offence.*

S. 22 of the Road Traffic Act requires the driver of a vehicle to report to the police, "If in any case owing to the presence of a motor vehicle on a road an accident occurs whereby damage or injury is caused to any person, vehicle or animal." The information preferred against the respondent alleged that he failed to report an accident by reason of which a stone wall and the vehicle itself which caused the damage were injured. The contention on behalf of the respondent that the damage was not to any person, vehicle or animal within the meaning of S. 22 was upheld.

REX *v.* THE RECORDER OF BOLTON: *Ex parte* MCVITTIE, (1939) 2 K.B. 98.

Public Health Act (1936), *S.* 58—*Order to execute works of repair or restoration—Specification of works if essential for validity of order.*

Under the Public Health Act, 1936, S. 58, the owner of certain structures was ordered by the justices for the County Borough to execute such works of repair or restoration or if he so elected to demolish the structure and remove the rubbish as may be necessary for remedying the cause of the complaint. The order was confirmed by the quarter sessions. On an order *nisi* for a writ of *certiorari* for quashing the order it was argued that the order was bad as it did not specify the works of restoration or repair.

Held, S. 58 did not require specifications of the works to be given and the order was valid.

MORSE *v.* MUIR, (1939) 2 K.B. 106.

Practice—Order for payment of costs of divorce proceedings —Subsequent order for payment by monthly instalments—Fresh action in King's Bench for interest on the costs—If maintainable.

In divorce proceedings there was an order for payment of £1,478 18*s.* 11*d.* to the petitioner who then took proceedings by way of judgment summons and obtained an order for payment of the amounts by instalments at the rate of 10*l* per month and after the whole amount had been paid commenced proceedings in the King's Bench Division for interest on the original amount.

Held, the original judgment debt is gone and for that has been substituted a debt payable by instalments of 10*l.,* a month and as the original judgment is gone he cannot recover interest on it.

COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS, S.A., (1939) 2 K.B. 117.

Shipping—Charterparty for two consecutive voyages—If two severable or one indivisible voyage—Deviation in the first voyage —Effect on contract.

By a charterparty dated December 30, 1937, the "Yolanda" was chartered and the charter was to be in force for two consecutive voyages. It was found that in the first voyage there was deviation and it was contended by the charterers that the contract came to an end.

Held, the true analogy to apply to the case is not the analogy of a charter for a single voyage but the analogy of a contract for delivery of goods in instalments. There was nothing to indicate that the ship intended to deviate in the second voyage and the charterers cannot refuse to implement the contract with regard to the second voyage.

BRITANNIA ELECTRIC LAMP WOKS *v.* MANDLER &Co., (1939) 2 K.B. 129.

Bills of exchange—Liability of indorser—Necessity for presentment for payment at address mentioned—Indorsement by a person who is managing director without any description—If indorsement by the company.

The document reads: "£100. 23rd September, 1937. Two months after date pay to our order the sum of £100 for value received". Across it is written "Accepted and payable at 2, Manville Road, Balham, S.W. 17" and then the rubber stamp "D. Mandler & Co. Ltd. . . . Managing Director" and D. Mandler signs his name above Managing Director and also on the back of the document.

Held, the document cannot be read as a promissory note made by D. Mandler and the signature (on the back of the document) of D. Mandler without any description cannot be read as the signature of the company and the document is futile. Presentment for payment must, if in the body of the note it is made payable at a particular place, be made at that particular place in order to render the indorser liable.

THE ABODI MENDI, (1939) P. 178.

Shipping—Action in rem *for possession of ship—Ship put in charge of the marshal of the Admiralty—Refusal of access to ship to master appointed by owner—If interference with custody of ship—Procedure.*

The Republican Government of Spain claiming to have requisitioned a Spanish ship issued a writ *in rem* and the ship was arrested by a marshal of the Admiralty. The owners entered unconditional appearance and the Nationalist Government also entered conditional appearance and claimed also to have requisitioned the ship. Plaintiff then gave notice of discontinuance of the action and asked that the warrant of arrest may be removed and defendant endorsed consent. On the same day plaintiff prevented the master from entering the ship and defendant withdrew the consent and moved by summons for the reinstatement of the master and the plaintiff asked for removal of arrest on the ground of discontinuance of the action.

Held, in an action for possession, once the ship was put into the charge of the marshal of the Admiralty Court, all persons concerned in the litigation were under a duty to abstain from any interference with the custody of the ship by the marshal. The exclusion of the master constituted a contempt and the master should be reinstated. Parties were given liberty to extract the release from the Registry after the master was reinstated.

In re HORROCKS: TAYLOR *v.* KERSHAW, (1939) P. 198.

Will—Probate—Jurisdiction of Probate Court to delete word —If to be exercised where omission of word will alter the sense of the will.

By a will of May 14, 1925 the testatrix bequathed the residue of her real and personal estate to her trustee in trust for such charitable institution or institutions or other *charitable or benevolent* object or objects..... The testatrix died on March 29, 1929 and the will and codicil were proved in common form on May 7, 1929 and the legacies paid. The respondents held the residue as trustees upon trusts declared by the will. In the 1st half of 1937, the solicitor of the testatrix was alleged to have discovered a typist's error

in the will of "or" instead of "and" in "charitable or benevolent." The respondents applied to have the probate corrected by the omission of the word "or". As the appellants objected to such important matter being decided on motion the writ was issued claiming to have the common form grant revoked and probate in solemn form with the omission of the word "or", granted,

Held, the Court of Probate has no jurisdiction to reject a word, the result of which would be to alter the sense of what remains and defeat the intention of the testatrix.

SIFTON *v.* SIFTON, (1939) P. 221.

Divorce—Husband's petition based on desertion—Discretion statement by petitioner admitting adultery—Answer by wife denying desertion and alleging adultery—Discretion statement by husband—If admissible in evidence.

The evidence given by the husband of his own adultery and the discretion statement put in evidence in earlier *ex parte* stage was available for the wife's framing of her counter-charge of adultery. In a petition for divorce based on desertion the presumption is against the deserting spouse and it is not incumbent on the petitioning husband (notwithstanding he did not expect or really want his wife to come back) to show that he was at all material times ready and willing to receive her.

CLARK *v.* CLARK (*No.* 1), (1939) P. 228.

Divorce—Adultery—Birth of child within 174 *days of access—If sufficient proof of adultery.*

A husband filed a petition against his wife, on the charge of adultery based simply and solely on the fact that on February 10, 1936, the wife gave birth to a child and that if the husband was in fact the father, the earliest possible date on which conception could have taken place was August 20, 1935.

Held, on the medical and other evidence it is utterly impossible to say that there is anything extravagantly improbable about this being a viable child, and there is no ground for saying that the child is illegitimate.

GALENE *v.* GALENE OTHERWISE GALICE, (1939) P. 237.

Husband and wife—Annulment of marriage by competent French Court—Judgment in rem—*English Courts—Duty to enforce.*

The marriage (in England) of the petitioner (a citizen domiciled in France) was annulled by a Court of competent jurisdiction in France on the ground of informality under French Law. Applying the general principle that a judgment of the competent

Court of the domicile is a judgment *in rem* which must be recognised and enforced by the English Court unless it is obtained by fraud, collusion or other unlawful means, *held*, a decree *nisi* of nullity ought to be granted.

JORDAN *v.* JORDAN, (1939) P. 239.

Divorce—Desertion—Previous proceedings—If terminates or suspends period of desertion.

The husband filed a petition for divorce on the ground of desertion for at least 3 years preceding the presentation of the petition (January 17, 1938). The wife left the husband on October 16, 1932 and there had been no resumption of co-habitation since the date. On March 1, 1933, the husband filed a petition for divorce on the ground of wife's adultery. The suit was undefended and decree *nisi* was passed on June 14, 1933. On December 18, 1933, the wife and correspondent obtained leave to appear and an order that decree shold not be made absolute before January, 22, 1934. On January, 19, 1934, the decree *nisi* was rescinded and the case ordered to be reheard. On January 26, 1934, the wife filed an answer denying adultery and making a cross-charge of adultery against her husband and prayed for divorce. On October 19, 1934, the husband's petition and wife's prayer in her reply were dismissed. There was no resumption of co-habitation.

Held, the fact of the institution and prosecution of proceedings by the deserted spouse does not absolutely terminate the offence of desertion but merely precludes him or her from asserting that the period of desertion runs during the pendency of those proceedings and that as a matter of law, the continued absence of the other spouse can re-assume "the quality of desertion" after the suspensory bar has been removed by the termination of the suit although there has been no subsequent resumption of co-habitation. It is not a condition precedent to the revival or continuance of the original desertion after earlier proceedings are disposed of, that some active steps have been taken by the petitioner towards bringing about a resumption of co-habitation.

CLARK *v.* CLARK (No. 2), (1939) P. 257.

Divorce—Desertion—Non-payment of amounts due under deed of separation—If intention to desert can be inferred.

By a deed of separation provision was made for the payment of 35*s.* per week to the wife and the husband paid for a considerable time, though irregularly and the wife eventually put the deed in suit and obtained judgment. In the wife's petition for divorce on the ground of desertion.

Held, from mere non-payment of the amounts under the separation deed, desertion cannot be inferred. Unless the withholding of payment is wilful, it has no significance.

SHAW *v.* SHAW, (1939) P. 269.

Divorce—Desertion—Refusal to commence co-habitation after expiry of agreement to postpone inception—If constitutes desertion.

A spouse who without excuse refuses to commence co-habitation after the expiration of an agreement merely to postpone its inception, can also be guilty of desertion.

BENNETT *v.* BENNETT, (1939) P. 274.

Divorce—Desertion—Insanity of deserting spouse—Effect.

Before a decree of dissolution for desertion can be granted, there must be desertion for 3 years immediately preceding the presentation of the petition. So, where a wife whilst sane, in fact deserted her husband for 31 years was certified as insane and was in a mental hospital for 18 months preceding the presentation of the petition.

Held, when she became insane her intention to desert came to an end, unless it is proved that although she was certified insane, on the question of co-habitation with her husband, she remained capable of forming a reasoned judgment. The burden of proof that she retains a rational intention to desert her husband rests on the petitioner.

JOTTINGS AND CUTTINGS.

Lord Shaftesbury as Lord Chancellor.—We read that when Lord Shaftesbury, who was appointed Lord Chancellor in 1672, sat in Court he wore neither wig nor cap, but a hat which Roger North charitably assumed might once have been black. In the Examen we are told that "His Lordship regarded censure so little, that he did not concern himself to use a decent habit as became a Judge of his station; for he sat upon the Bench in an ash-coloured gown silver-laced, and full-ribboned pantaloons displayed without any black at all in his garb, unless it was his hat which now I cannot positively say, though I saw him, was so." Another writer tells us that as late as the reign of Queen Anne, a Lord Keeper wore his own hair in Court, until he received the Sovereign's express order to adopt the venerable disguise of a full-bottomed wig. Lady Sarah Cooper recorded of her father, who was appointed Lord Keeper in 1705, that "the Queen after this was persuaded to trust

a Whig ministry, and in the year 1705, October, she made my father Lord Keeper of the Great Seal, in the 41st year of his age—'tis said the youngest Lord Keeper that ever had been. He looked very young, and wearing his own hair made him appear yet more so, which the Queen observing, obliged him to cut it off, telling him the world would say she had given the seals to a boy." Obeying the regal command he, when he appeared in Court in his wig, looked so grave and reverend that the Queen had to look at him twice before she recognised him.—*L.T., 1939, p. 342.*

Counsels' Wig.—It is said that when members of the Bar began to adopt the wig in Court, the judges looked upon them as coxcombical in the last degree, and one writer goes so far as to say that the more prudent, not to say cunning, barristers, declined to adopt the obnoxious head-covering. Chief Justice Hale, an austere man, in particular, looked with much disfavour on counsel who wore periwigs and attorneys who went with swords. But the Court wig made headway, if the paronomasia may be pardoned, and it became almost universal by the close of the seventeenth century. In Scotland, however, the wig as the head covering for members of the Faculty of Advocates was slower in coming into vogue, the cocked hat and the powdered hair being the fashion. When Alexander Wedderburn joined the Faculty in 1754 wigs had not come into fashion with the Edinburgh advocates; and when precisely they did does not seem to be established. Even as late as the early part of the last century Jeffrey was accustomed to appear in the Court of Session without the conventional forensic head covering, but probably he was among the last to be thus conservative.—*L.T.*, 1939, *p.* 343.

Sir Henry James's Wig.—Older members of the Bar may recall Sir Henry James while still in practice, and they may remember that he was one of the last to have his wig periodically powdered, to make it, like that of the Laird of Cockpen already mentioned, "as guid as when new." But he had a singular experience once while in Court. Being a Queen's Counsel, he was, of course, seated in the front row, where he wss waiting to be called upon when his opponent had concluded his argument. Leaning back, the tails of his wig were seen by one of the old reporters, who sat immediately behind, to be getting into perilous proximity to the ink well in the juniors' row. With the laudable desire to save the white tails of the distinguished counsel's wig from being immersed in the ink, the reporter, whom the present writer knew well, gallantly came to the rescue by cautiously inserting his pen into the loop of the wig and proceeding to edge it to a safe distance, when, as ill-luck would have it, Sir Henry somewhat abruptly jerked his head, with the consequence that the pen, still entangled in the loop, twitched the

wig right off, to the intense amazement of Sir Henry, who, naturally, turned round sharply, imagining that some diabolical agency had been at work. Hurried explanations were offered, and the incident ended like the fairy tales, quite happily. It was certainly an adventure for the reporter, and it gave him something to talk of in his later years.—*L.T. 1939, p. 343.*

Law Revision.—Lawyers are frequently, though quite ungenerously, assumed to seek the perpetuation of old rules in which they have been nurtured, regardless of the fact that they may run counter to what the ordinary person would consider fair dealing between man and man. For the most part, lawyers, like others, have to accept the law as they find it, but it is worth emphasising that most of the reforms, both in its substance and in its form, have emanated from members of the profession. The Law Revision Committee, during the few years of its existence, has been able to suggest various reforms which have proved of immense value as bringing rules of law more into consonance with its moral aspect. Now the committee has made a very practical proposal, namely, the modification of the rule laid down, no doubt correctly in strict law but on lines which many thought exceedingly harsh, in *Chandler* v. *Webster,* (1904) 1 K.B. 493, a case arising out of the postponement of the Coronation Procession in June, 1902, deciding that no action would lie to recover back money paid by the defendant to the plaintiff for the right to view the royal procession from his window. There, it will be remembered, the Court of Appeal decided that the defendant was entitled not only to retain the money paid on account, but was entitled also to recover the balance, the right to which had, by the terms of the contract, accrued prior to the date when the contract became impossible of performance. No doubt as the law stood, and still stands, the decision was correct, but nevertheless it could not fail to strike the layman, particularly the defendant in the action, and lawyers as well, as difficult to reconcile with justice. Sharing this view the Law Revision Committee propose that the rule should be modified by providing that in such circumstances the money paid prior to the frustration of the contract shall be recoverable, but subject to the deduction of such sum as represents a fair allowance for expenditure incurred by the payee for the purpose of performing the contract. Further, when at the moment of frustration the contract has been in part performed and that part is severable, the proposed rule is to apply only to that part of the contract which remains unperformed.—*S.J., 1939, p. 385.*

The Recommendations.—The recommendations concerning this important matter should be set out in detail. They are to the effect that the following rules shall apply when performance of a contract has been frustrated in whole or in part and any money has

been paid, or has been agreed to be paid, at a time prior to the frustration: (1) Money paid by the one party to the other in pursuance of the contract shall be recoverable, but subject to a deduction of such sum as represents a fair allowance for expenditure incurred by the payee in the performance of or for the purpose of performing the contract. In fixing the amount of such deduction the Court shall include an allowance for overhead expenses, but shall also take into account any benefits accruing to the payee by reason of such expenditure, and the amount recovered shall not exceed the total of any money so paid or agreed to be paid under the contract. Loss of profit shall in no case be taken into consideration. (2) When at the moment of frustration the contract has been performed in part and the part so performed is severable, these rules shall apply only to that part of the contract which remains unperformed, and shall not affect or vary the price or other pecuniary consideration paid or payable in respect of that part of the contract which has been so performed. (3) For the purpose of these recommendations no regard shall be had to amounts receivable under any contracts of insurance. Finally, it should be observed that the committee does not recommend any alteration in the law relating to freight *pro rata itineris*. It is recognised that the rule has been frequently criticised, but considered that it has become so firmly fixed that it would be undesirable to alter it. For the same reason no alteration in the law relating to advance freight is favoured, except in the case of hire paid in advance under a time charter, which, it is considered, should be recoverable in the event of frustration of the adventure in the same manner and to the same extent as other payments in advance made under a contract. The report of the Committee is published as a White Paper by H. M. Stationery Office (Cmd. 6,009, price *2d* net).—*S.J., 1939, p. 385.*

Bowen's Version of Latin Maxim.—In the Life of Lord Bowen, written by Sir Henry Stewart Cunningham, are enshrined many examples of the bright, sparkling wit for which Bowen was famous, one of these being a capital instance of a delightful manipulation of a well-known maxim. When it was uttered, Bowen was still at the Bar and he was appearing for the plaintiff, who was grounding his right to a piece of unenclosed land on the fact that his donkey had been habitually pastured upon it. At the close of the argument the judge inquired whether the plaintiff claimed the land through his accredited agent, the donkey. "Yes, my Lord," was Bowen's prompt reply. "My contention is, *Qui facit per asinum facit per se.*" What could have been neater?—*L.T., 1939, p. 359.*

Bias.—If Lord Hewart had no other claims to fame he would be honoured by present and future lawyers for his judgment in *R.* v. *Sussex Justices*: Ex parte *McCarthy*, (1924) 1 K.B. 256. The famous passage, in which he insists that in all Courts justice must

not only be done, but must be clearly and undoubtedly be seen to be done, has been so often quoted that few lawyers do not know it. Yet the fundamental rule which it expresses is still sometimes ignored by those who have to administer justice in inferior Courts. Last week a case of this kind came before a Divisional Court in the Divorce Division. A husband appealed against an order for maintenance which had been made by a Magistrate in a western city. He supported his application by evidence showing that the learned Magistrate was an intimate friend of his wife and his mother-in-law. He showed that his wife had told him (the applicant) that she would take steps to bring her complaint, or some similar complaint, before the Court on the particular day when this magistrate was sitting. The husband made due protest when the case came on below, but was overruled. Now he has got a new trial. The judges were careful to exonerate the magistrate from all charge of partiality; which, of course, we endorse. That was not the issue. The applicant may have got a fair trial: but could reasonably think that he had not.—*L.J., 1939, p. 299.*

Lord Merrivale.—Lord Merrivale, known at the Bar as Henry Duke, who died last Saturday at the age of 83, was the last survivor of the great advocates who dominated the Common Law Bar and won popular fame at the beginning of the present century; the others were Rufus Isaacs, Edward Carson, F. E. Smith and Marshall Hall. Sir Edward Clarke was earlier. The careers of the first three are well known. Marshall Hall did not go beyond advocacy. While at the Bar Henry Duke was the equal of any of them. Perhaps in his restrained and effective handling of cases he surpassed them. And he made his position entirely by his own merits. Without the advantages of public school or university education, he passed from apprenticeship in West Country journalism to the Press Gallery of the House of Commons, and then in 1885 he was called by Gray's Inn, and renewed his West Country associations on the Western Circuit. But all this was only the prelude to the position he won in London. Marshall Hall and Rufus Isaacs took silk in 1898, Henry Duke followed them in the following year. "F.E." was ten years later in 1908. Carson was already an Irish Q.C. when he came to the English Bar in 1892, and the silk in this country, which was at first refused to him, he obtained in 1894. After nearly 20 years in the first rank at the Bar, Duke became Secretary for Ireland when the Dublin Rebellion had broken Birrell's career there. But though Duke continued a policy of leniency, he succeeded little better than others. In 1918 he found a more congenial position in the Court of Appeal. A year later he became President of the Probate, Divorce and Admiralty Division, and was raised to the Peerage as Lord Merrivale in 1925. In the Divorce Court he had to deal with the new conditions due to the Matrimonial Causes Act, 1923, and he proved himself a capable, courteous and dignified

judge. His judgment in *Apted* v. *Apted* in 1930 had an important effect in fixing the present manner in which the judicial discretion in divorce is exercised. "Above all things," said Sir Francis Bacon of judges, "integrity is their portion and proper virtue". The words may fittingly be applied to Lord Merrivale.—*L.J., 1939, p. 369.*

A Famous Saying.—I have seen in an old file of the *Westminster Gazette* correspondence relating to the question as to whether Lord Justice Mathew, who had recently died, was the inventor or first author of the phrase admittedly used by him:

"Truth will out, even in an affidavit."

What Sir James Mathew "certainly said", according to one correspondent, was: "Truth will leak out, even in an affidavit". "The occasion", said the writer, "upon which he committed this brilliancy was an action brought to recover some land. At the end of the plaintiff's case it was submitted that there was nothing to show that the defendant was in occupation of the premises, and upon the evidence given at the trial the objection seemed to be fatal. But it occurred to the plaintiff's advisers that in an affidavit, made in an interlocutory application when it was important that the defendant should maintain the *status quo,* he had sworn that he was in possession. The affidavit was put in, and Mr. Justice Mathew (as he then was) gave judgment for the plaintiff in the single sentence aforesaid."

It had been alleged that Charles Reade had already coined the phrase. "If so," said the correspondent, "the learned Judge might well say, '*Pereant qui ante nos nostra dixerunt!*' "—*L.J., 1939, p. 380.*

Truth Will Out.—The *Westminster* itself, writing from recollection, was "quite sure it was Charles Reade who first jested as to the affidavit". Later it gave the reference. "We have now before us as we write a copy of *The Cloister and the Hearth,* and in Chapter XXVII (page 171 of our edition) we have the following:

"Alas! It was an unlucky day. His sincere desire and honest endeavour to perjure himself were baffled by a circumstance he had never foreseen nor, indeed, thought possible.

He had spoken the truth.

And IN AN AFFIDAVIT""

The *Westminster* thought the Judge was quoting what at the time he believed to be familiar to many.

Another newspaper was of opinion that the legal *bon mot* was generally misunderstood. "He was not," said this paper, "disparag-

ing the veracity of affidavits, though cynics have naturally seized on this interpretation, but contrasting unfavourably the value of written documents for getting at the whole truth with that of cross-examination".—*L.J., 1939, p. 380.*

Lord Merrivale.—No man who, before Ireland was a nation, allowed himself to be appointed to the Chief Secretaryship for that country could reasonably expect to survive the experience with unimpaired prestige. He might indeed survive, but hardly as a politician. Lord Merrivale, when he was Mr. Duke, K.C., M.P., a patriot, went to Ireland after the Easter Rebellion of 1916 not fully knowing whither and to what kind of people and problems he went. "Who are these Sin Feeners?" he asked an Irish friend of the English Bar a few days before he went to Dublin as Chief Secretary.

No further rebellion occurred in his time, but he was not regarded as wholly successful. He resigned in 1918; and returning to England and the law happily succeeded Swinfen-Eady, L.J., in the Court of Appeal. After 18 months he became President of the P. D. and A. Division, and so continued, living in Gray's Inn, until his retirement in 1933. Calm, seeming slow, patient, just, courteous and Devonian, he looked and was in fact grandly judicial, despite a certain hardness of hearing which hampered him in his later years.

I can just remember the days when Carson and he were often the "fashionable" leaders on opposing sides in the K.B. Quick in perception and slow of speech were both; well-matched, too; and the forensic battles of the Devonian and the Irishman were the students' joy.—*L.J., 1939, p. 381.*

Dissenting Judgments in the Lords.—Correspondence in the *Times,* to which Lord Dunedin and Dr. A. F. Pollard have contributed, has raised the question of the value of dissenting judgments in the House of Lords, and also of the different practice as to such judgments in the House of Lords and the Privy Council. The two questions are related, but distinct. Everyone knows the value of dissenting judgments. They are the whiff of salt sea air that keeps the judicial atmosphere of the House of Lords fresh and invogorating. Of course, the law and its application, however uncertain and confused the issue till the case reaches the House of Lords, may by the time it has arrived there become, if not clear, at least reasonably certain, and then the Lords follow their leader, each, in Lord Bowen's phrase, becoming Lord Concurry. At other times the lists are set and there is battle royal. The best known instance is the duel between Lord Birkenhead and Lord Sumner in the Russell legitimacy case in 1924, and in a sense Lord Dunedin decided the dispute, for had he been on the side of Lord Sumner instead of on

the side of Lord Birkenhead, Lord Sumner would have won. Still more dramatic is it when a single Lord—an Abdiel in the Judicial Peerage—stands firm against the serried ranks of the majority who make the law by the sheer force of numbers. So Lord Shaw—not yet Viscount Craigmyle—upheld Magna Carta and the liberty of the subject in *Zadig's* case in 1917, and Lord Finlay struck a shrewd blow for Christianity in *Bowman* v. *Secular Society*. No, we could not do without the Great Dissenters in the House of Lords, useful as Lord Concurry may be.—*L.J., 1939, p. 403.*

The Unanimity of the Judicial Committee.—And when we pass from the House of Lords to the Judicial Committee, we find a great change. No one would speak without sincere respect of this Tribunal. For one thing its jurisdiction is the widest of any court in the world. It extends over a quarter of the population of the globe. For another, there is no fuss about it. "Its business is the search for truth; and the stuff which it works in is justice. A grave task and austere, according so much with simplicity and quiet that there is no place there for even the paraphernalia of a court." But while the great position which the Judicial Committee holds is well recognised, we do not suppose that its judgments rank in interest and weight with those delivered in the House of Lords. In the Judicial Committee there is no dissent, and members of the court who do not agree—if there ever are any—have to submit with a good grace. As to what happens when there is a difference of opinion history perhaps is silent. Lord Dunedin says that there would be no difficulty in recording a dissenting opinion; but he does not say that he ever did so. Dr. Pollard differs. He expresses the usual view that Judicial Committee judgments are unanimous because the members are not giving judgments, but advising the Crown, and they must speak with one voice. And he points to the practical difficulty in reversing a judgment by legislation. This can be readily done with a judgment of the House of Lords, but there is no common legislature to override a decision of the Privy Council. For this reason, perhaps, the House of Lords is bound by its own decisions; the Judicial Committee is not. Appeals to the House of Lords are now restricted, and the Judicial Committee no longer receives appeals—or very rarely—from some of the Dominions; but both these final Tribunals are held in high esteem.—*L.J., 1939, p. 403.*

Judah Philip Benjamin.—In the course of his recent miscellaneous reading the present writer has met with various references to the striking career of this distinguished lawyer whose memory is perpetuated in the Profession by his classic work on Sale. Born in the West Indies, Benjamin started his professional work in New Orleans, and soon built up a large practice, for he was a forceful advocate and a shrewd adviser. Ere long he conjoined legal work

with a keen interest in politics, in 1861 joining Jefferson Davis's Cabinet as Attorney-General, and later becoming his Secretary of State till the collapse of the Confederates. Escaping in an open boat, he eventually reached this country, where he was in due time called to the Bar through the good offices of Lord Cairns, after only a short probationary period, and, despite a not over-prepossessing appearance and a voice with the very worst of American twangs, he triumphed over those disadvantages and made his merits known.—*L.T., 1939, p. 391.*

An Early Case.—The late Sir John Hollams, in his pleasant little book of professional reminiscences, had a good deal to say of Benjamin, of his forcefulness in advocacy and persistency in the submission of his points, instancing his appearance as junior in a Chancery suit instituted by the American Government against certain agents in this country with respect to the expenditure of the large amount raised in Europe by the issue of Confederate bonds. The suit came on before Vice-Chancellor James, and it appeared that, as usual at that time, a decree would be made directing inquiries in chambers, when, suddenly Benjamin rose, and to the astonishment of all present, began thus in a stentorian voice: "Notwithstanding the somewhat off-hand and supercilious manner in which this case has been dealt with by my learned friend, Sir Roundell Palmer, and to some extent acquiesced in by my learned leader, Mr. Kay, if you will only listen to me—if you will only listen to me—(repeating the same words three times, and on each occasion in a crescendo), I pledge myself you will dismiss this suit with costs". Sir John added that the Vice-Chancellor, Sir Roundell Palmer and the whole court looked at Benjamin in amazement, but he went calmly on without intermission for an hour or two. The court became crowded, for it was very soon bruited about that something singular was going on in the usually quiet court of the Vice-Chancellor. In the end the suit was dismissed, and this dismissal was confirmed on appeal.—*L.T., 1939, p. 391.*

Pressing Appointment.—Often a joke has a longer and more complicated ancestry than you might think. I myself have traced one back with little variation to the time of the ancient Romans. Thus in a recent number of a comic paper there was a drawing of an infuriated lady in bridal dress standing in an office ante-room while the switch-board girl calls through: "There is a lady to see you, Mr. Larkin. Says you had a ten o'clock appointment with her." Now, more than a hundred years ago, the Inns of Court used to rock with laughter at the story of Mr. Serjeant Hill's wedding day. In the morning he went to his chambers as usual but, becoming immersed in a brief, forgot all about his engagement. Time passed and at last a messenger was sent in search of him and

brought him safely to the church. After the ceremony he found means to get back to his library to look up another case, and it was dinner time before his clerk could get him packed off home to his expectant bride. I believe it was Chief Baron Palles whose last thought as he left for his honeymoon was to take Fern on "Contingent Remainders" with him.—*S.J., 1939, p. 475.*

A Bold Peer.—An extra from the *Morning Post* of a hundred and fifty years ago tells how after a conflict between Lord Stanhope and several bishops on a Bill brought in by him, another Bill was postponed to a future date, the noble lord declaring "that he would on that day teach the Lord Chancellor of England law as he had on the present taught the Bench of Bishops gospel". One can only gasp at his boldness thus to beard Lord Thurlow on the Woolsack:

> "That rugged Thurlow who with Sullen Scowl
> In surly mood at friend and foe will growl."

Hardly had be received his peerage when he cowed the whole House of Lords by trampling on the Duke of Grafton who had sneered at his plebeian origin. "The noble Duke", he said, "cannot look before him, behind him or on either side of him without seeking some noble Peer who owes his seat in this House to successful exertions in the profession to which I belong. Does he not feel it is as honourable to owe it to these as to being the accident of an accident?" His verbal ferocity caused him to be known as "The Tiger". Once the Bishop of Peterborough fell foul of him by speaking of "fruitless desolation" which, said the Chancellor, is "an expression which carries no meaning and is neither sense nor grammar. It is not supported by any figure of speech or by any logic or even by any vulgarism that I ever heard. 'Fruitless desolation,' my lords, is rank nonsense. I was not aware before that desolation might be fruitful."—*S.J., 1939, p. 475.*

The Week's Personality.—On the 22nd June, 1861, Lord Campbell seemed, despite his eighty-one years, to be in full vigorous health. Only two years before he had taken on the Chancellorship, a final proof of his supreme talent for getting on, and after a life spent in the Common Law Courts he had turned himself into a respectable Equity Judge. On this day, in 1861, he drove to Lincoln's Inn with two of his daughters, sat in court till the afternoon and then went to Downing Street for a Cabinet meeting. Then he went home to Stratheden House and, having some time to spare before preparing for a dinner party, he sat down at his desk and wrote a judgment. The first of his guests to arrive was his old friend Sir David Dundas, who had just come from the bedside of one who had been stricken with the loss of all his faculties. Campbell declared that there should be added to the litany a fresh

petition: "From a lingering illness, Good Lord deliver us". He entertained his guests with animation and bidding his children good night finally retired to his room near midnight. Next morning his servant found him sitting in his chair dead. He had been "honourably released from the labours and anxieties of the Great Seal".—*S.J., 1939, p. 495.*

No Flying Start.—In a recent address in Gray's Inn Hall, Sir Wilfrid Greene, the Master of the Rolls, pricked the bubble of a common illusion that an advocate's life is a series of dramatic incidents by which he attains success with no mental effort. He also treated as imaginary the popular picture of the fortune-making brief unexpectedly delivered to a young advocate sitting in his chambers at 5 o'clock on a Saturday afternoon by a desperate solicitor who has hunted through the rest of the deserted temple. There is rarely any drama about a first brief. When the future Lord Sankey first went into a London court he took ten volumes of law reports and was very apprehensive of the pugnacious reputation of his opponent. To keep his courage up he kept murmuring: "There is a tide in the affairs of men." But there was no tide. The other side submitted to judgment and all he had to say was: "My lord, I ask for costs." The great *Hawkins, J.*, returned his first brief because the prisoner he was briefed to defend on a charge of stealing a wheelbarrow had pleaded guilty. He only realised his foolishness when he heard a senior counsel who had pocketed the guinea simply admit the man's guilt and express the hope that the Judge would deal leniently with him. Equally undramatic was the coming of the first client to the future Mr. Justice Alpers of New Zealand where Bar and solicitors are one. A member of the profession brought him an affidavit to be sworn, but suddenly he remembered that he had not the remotest idea of the proper form of words. He therefore had to appeal to his visitor, who obligingly dictated the formula and was duly sworn.—*S.J., 1939, p. 495.*

First Appearances.—Sometimes briefs do come out of the blue. The late Mr. Balfour Browne, K.C., on his first circuit, received a brief at Derby from an unknown solicitor. When the case was over he asked his client how he came to deliver it to him, and received the cryptic reply: "It was because you went into court last". But though Balfour Browne tried the method again it never worked. The famous Montagu Williams, who became a great criminal advocate, made a very poor show in his first case, a prosecution for horse-stealing. On the inevitable acquittal, he so far forgot himself as to jump up in great anxiety, exclaiming: "My lord, what's to become of the horse?" Marshall Hall's first employment was a Chancery case in which all he had to do was to consent to an injunction against his client.—*S.J., 1939, p. 495.*

Enthusiasm for the Law.—We have it on the uncontrovertible authority of Lord Chancellor Bacon that every man is a debtor to his profession, a pronouncement which presumably means that those belonging to the particular calling owe to it the obligation of carrying out the duties entrusted to them with the utmost diligence and with the like integrity. This is, of course, true of all professions, but it is especially true of that to which we belong; but while members of the legal profession readily acknowledge the obligations incumbent upon them towards their clients and towards the court, not everyone evinces any particular enthusiasm for the work he may be called upon to undertake. He may, no doubt, feel a generous warmth when briefs arrive at his chambers marked with comfortable fees; further, in the heat of advocacy he may feel something of that joy which, according to Sir Walter Scott, the warrior feels on encountering a foeman worthy of his steel, but this is the joy of conflict rather than the quiet satisfaction which animates the expert on some legal subject when something he has undertaken to carry out eventuates in a complete success. Curiously enough, such a sense of satisfaction seems to have been attained by those of whom the great world in the sphere of law know nothing or very little, such as those whose lives, professionally speaking, have been spent in the quietude of their chambers in the drafting or the revision of documents either for the purposes of litigation or the investigation of title.—*L.T., 1939, p. 423.*

Lord Campbell's Tribute.—The many volumes that came from the busy pen of Lord Campbell treating of the lives of the Lord Chancellors and Chief Justices may not all be taken *au pied de la lettre* in the matter of strict accuracy or just appreciation of the various characters who move across his pages, but at least this may be said with assurance that he was able to write so attractively that he who runneth may read. There is no gainsaying the brilliance of his writing and the intense human interest he gives to his biographies. Occasionally, too, he intersperses an anecdote of special interest, and one of these is particularly relevant to the matter in hand. In his biography of Thomas Parker, who rose to be Lord Chancellor Macclesfield in the Georgian period and who was a particularly fortunate person in some respects, we read that on his being presented with the Great Seal in 1718 it was accompanied by an extraordinary gift of £14,000 from the King, while his son was granted a yearly pension of £1200 till he obtained the place of teller of the Exchequer, to which he was appointed in the following year. It is true that Lord Macclesfield fell on evil days by reason of corruption in the sale of offices and of other delinquencies not quite fitting his position as the head of the law. The point in connection with this Lord Chancellor to which attention is called by Campbell on the topic now under discussion dates from the days when Macclesfield was still at the Bar and was only Mr. Parker:

As counsel in the once famous *cause celebre, Regina* v. *Tutchin,* which was tried by Lord Holt at the Guildhall, his argument on the objection taken to the regularity of the jury process, Campbell says, was "most masterly, and by genuine lawyers is perused with enthusiasm". This then leads Campbell to append a foot-note which is surely one of the most delightful of his anecdotes, namely, a saying of the deceased Mr. Duval, the greatest conveyancer of his day. On being asked by Campbell whether the constant perusal of abstracts of title was not "weary work" Duval replied thus: "It is sometimes a little dull; but every now and again one meets with a brilliant deed, which is a reward for all one's labour." To this confession of enthusiasm Campbell appends no less than three notes of exclamation, as if to call attention to the absurdity of the remark; but while our individual tastes may not run exactly in the same direction as Duval's, we may admire the genuine enthusiasm he brought to his daily round and common task.—*L.T., 1939, p. 423.*

Theobald Mathew.—We very much regret to have to record the death of Mr. Theobald Mathew at the age of 72. The son of Lord Justice Mathew, who was one of the great Judges of late Victorian years, he showed, though in a less prominent sphere, the abilities of his father abilities enlivened by a humour to which pen and pencil alike bore witness. To readers of The Law Journal he was known by his *Forensic Fables,* which for a series of years portrayed the lighter side of litigation. In this he followed in the steps of Sir Frank Lockwood, whose sketches, both legal and political, delighted an earlier generation. And Theobald Mathew's abilities were shown, in a more serious though still very interesting way, in the collection of essays which he published in 1937 under the title *For Lawyers and Others.* The *Duchess of Kingston's* case is a well-known leading case in Estoppel, but Mathew's account of it brought out the human interest which its technicalities concealed. And he was equally at home in the "Decline and fall of the Serjeants" and in the need for reforming the Judicature Acts. But these were only diversions. "Silk" did not win him from the Junior Bar, and he remained there to give his numerous clients the benefit of his wide knowledge of legal principle and his shrewd judgment on the possibilities of their cases. And with his combination of wit, kindness and learning it is small wonder that he gained with the Bar a position of esteem which is rarely rivalled.—*L.J., 1939. p. 443.*

The Macnaghtens.—The Hon. Mr. Justice Macnaghten, who has been on the Bench for more than 10 years, is in himself a justification of the hereditary principle. In him more than in any other contemporary Judge the learning and principles of the Common Law and of Equity are combined, and he can apply them without conflict.

In his earlier youth he went from Eton to Cambridge with a major scholarship at Trinity; he was President of the Union in 1890 and graduated with a First in the Historical Tripos in 1891. Called by Lincoln's Inn in 1894 he was elected Bencher in 1915 and took silk in 1919, and both as junior and silk had a large practice. Unionist M. P. for North Derry in 1922, he was elected for the City and County of Londonderry in November of that year and he continued until his election to the Bench in 1928. He was returned at the previous General Election by the largest majority of any member of the House.

The great Lord Macnaghten, appointed direct from the Bar to the House of Lords, who twice refused offers of Judgeships and once the Principal Secretaryship of State was his father, of whom it is written in the *Dictionary of National Biography*: "As a Judge his name will long endure. He possessed in a happy combination the gifts of listening with patience and deciding without doubt, after bringing to bear his great range of unobtruded learning and a clear practical appreciation of business and of character .... it was remarkable that both Bench and Bar fell into the way of citing a sentence or two of an opinion of Macnaghten and of accepting it without discussion as an authoritative statement of the law."

The mother of Macnaghten, J., was the only child of Sir Samuel Martin, Baron of the Exchequer; "his vast knowledge of business and the vigour of his understanding enabled him to master the essential parts of a case with marvellous celerity and his judgments were marvels of terseness and precision." He went Circuit as a Judge, and where demanded by justice could impose a heavy sentence; but "his natural kindness of heart induced him not infrequently to endeavour to obtain their mitigation."—*L.J., 1939, p. 455.*

The Passing of Theobald Mathew.—Theo Mathew is dead. The Bar could not, by the death of any of its members, suffer a greater loss. He would go on working almost to the end of last term, when he ought to have rested. Last Friday, although he was very ill and spoke with difficulty, I thought he would recover; that his mind, keen and alert as ever, and his unquenchable spirit would compel his body to survive. He rejoiced to see his friends and to hear and speak of what was doing in the Temple; of the South-Eastern Circuit and of the dinner given to his friend "Malcolm" at Chelmsford; and the irresistible humour of his comments evoked laughter from the two who were with him, one of them the brave woman who nursed him to the end and is now his widow. Under the fresh shock of this melancholy news I know not what to say or how to say it. I am one of a great number who loved this man; and the grief we feel is not so much for the man of genius; the incomparable and kindly wit, the lawyer of great learning the inimi-

table author of forensic fables and caricatures the master of the spoken and the written word; but rather for the man incapable of meanness, the friend whose life was spent in helping others rather than himself. He went about doing good; and he did so as a good Christian unconscious of his merit, in accordance with the precept: Let not your left hand know what your right hand doeth.—*L.J., 1939, p. 455.*

Voluntary Judicial Service.—One notable characteristic of English public men is their readiness to undertake voluntarily duties without any reward save the satisfaction they may themselves feel in rendering useful service to the nation. Again and again this has been exemplified in various departments of our national life, and notably in that of the law. It might well be thought that one who has discharged the arduous functions to which a Judge of the Supreme Court is called, for the period entitling him to retire and thus obtain a well-earned rest, had sufficiently demonstrated his devotion to duty, but time and again ex-judges have returned to what the poet termed "the dusty purlieus of the law" in order to lend assistance in clearing the arrears which periodically have a knack of accumulating. This public spirit has again been exemplified during recent days in the Judicial Committee of the Privy Council, where Lord Fairfield, whom we best recall as Lord Justice Greer, and who only recently retired from the Court of Appeal where his profound legal learning and his invariable courtesy proved an asset of which we were all proud, and also Lord Salvesen, an ex-judge of the Court of Session, have been assisting in disposing of the heavy list of appeals which have come from the various outposts of Empire to find their definitive decision in the quietude of the Council Chamber. Seeing that the Judicial Committee has a jurisdiction unexampled in extent and diversity of laws it is of the greatest advantage to have on the Bench representatives of various systems of law, each being thus able to bring his special knowledge into the common stock, and so making the committee a centre of enlightenment in juristic learning.—*S.J., 1939, p. 505.*

Legal Formulas.—This week the House of Lords in its judicial capacity has delivered a large number of decisions, most of them of great importance, but it is curious to note that their lordships, in announcing their intention to deliver their decision, do not, as do the judges of the High Court and Court of Appeal, intimate in the cause list their intention to "give judgment" on a certain date, they announce that the case is "to be considered," which means that they will deliver their opinions; in other words their judgment. These little differences in terminology are duly reflected in the reports. In the Law Courts the reporter at the end of the argument he provides will probably use the words *"Cur. adv. vult."*, which, as we all know,

is the abbreviated form of stating that their lordships announced their intention to postpone giving their decision, whereas in the reports of cases in the House of Lords the corresponding formula is: "The House took time for consideration," and in due course, in the official list, the case will appear as "to be considered" on the date mentioned. These, to be sure, are small matters, but they have a certain interest, showing, no doubt, the force of tradition.—*S.J., 1939, p. 505.*

Limited Knowledge.—A story has come down to us regarding someone who might be described as a well-informed man who strenuously endeavoured to open up a conversation with a traveller whom he encountered on his route, but all his efforts to draw the latter proving futile, at last expostulated thus: "My friend, I have tried to talk to you on a great variety of subjects—the weather, politics, the law, the church, business, the crops, but all in vain. Is there any topic on which we might hold converse?" To this the hitherto unresponsive person replied: "Can you say anything pretty about bend leather?" Apparently this subject, whatever it might mean, was outside the talkative gentleman's parish and one gathers that no conversation ensued, as how could it? All cannot, it is true, be Admirable Crichtons with a universality of knowledge, but in the law it is of course essential to possess a considerable stock of knowledge of life and its affairs, and the greater the stock the more useful it will be found. This does not of course mean that we should be like him of whom Lowell wrote long ago as

"A reading machine, always wound up and going,
He mastered whatever was not worth knowing."

L.T., 1939, p. 11.

Gaps in Judicial Knowledge.—Occasionally it has happened that even on the Bench its occupant has had to confess to a lack of familiarity on some subject forming part of the case under discussion, or even has shown in a very marked degree that he is ignorant altogether of the matter discussed. One of the most amusing instances of this, due to unfamiliarity with local terms, is said to have occurred at Newcastle long ago. According to the story, the deputy-surveyor of the city was giving evidence at an important trial, and doing so in dialect of the true Northumbrian type. He deposed as follows: "As I was going along the quay, I saw a hubbleshew coming out of a charge-foot." The Judge, it is not surprising to be told, was not aware that on Tyne-side the term "hubbleshew" denoted a "concourse of riotous persons", or that the narrow alleys or lanes in the city were popularly known as "chares," and that the lower end of each alley was termed a "chare-foot", but he seemed at the moment to be puzzeled only by the curious word "hubbleshew", so he inquired its meaning, which having been ex-

plained by the witness, the Judge said: "And you mean to say that you saw a crowd of people come out of a chair foot?" "I do, my Lord," said the witness. Thereupon the story goes that the Judge turned to the jury, and remarked: "Gentlemen of the jury, it must be needless for me to inform you that this witness is insane!" It is to be hoped that his Lordship was eventually put right on the true meaning of a chare-foot, and as to the sanity of the witness, and that no miscarriage of justice was caused.—*L.T., 1939, p. 11.*

BOOK REVIEWS.

THE LAW OF MASTER AND SERVANT by Anadinath Sarkar, B.L. Published by Messrs. M. C. Sircar & Sons, Ltd., 14, College Square, Calcutta. Price Rs. 4.

In this short treatise on the subject of 'Master and Servant,' the author has succeeded in producing a useful book of reference. Under the various chapters, the relationship of Master and Servant with particular bearing on the topics of Servant and Agent, Servant and Bailee, Servant and Apprentice, etc., has been lucidly brought out with the case-law up to date, both English and Indian. The liability of master in an action for tort against the employee especially in the course of the master's service, is a subject of perennial interest coming before courts for decision, and we have the satisfaction that the book deals with it in a separate chapter adequately illustrating the points with leading cases.

We hope the modesty of the author in introducing the book to the public with the words 'nor does it aspire to stand on the same shelf with the masterly works on the subject' may not deter the eager students of that branch of the law from profiting much by a perusal of it.

INCOME-TAX RETURN AND HOW TO FILL IT by Surendra Singh, M.A., B.SC., LL.B. and D. R. Jain, A.C.A. (Eng. & Wales), A.S.A.A. (Lon.), F.F.C.S. (Lon.), 2, Hotu Singh Road, Lahore. Price Re. 1.

It will be found that this pamphlet is very timely after the recent amendment of the Income-tax Act. Many will agree that the recent amendment has only added more difficulties to an Act already not easy of understanding. Hence an attempt of the kind this pamphlet makes will receive the recognition it deserves.

MEDICO-LEGAL COURT COMPANION. Published by the Eastern Law House, Calcutta, 1939 Edn. Price Rs. 7-8-0.

The volume under review has deservedly enjoyed reputation for its clarity, and the fact that it has run into three editions makes its popularity more convincing to us.

The subject is discussed in every chapter with necessary references to the various sections of the Indian Penal Code. There is nothing therefore to detract us from realising the author's thorough grasp and exhaustive comprehension of the subject. The questions that are appended to this volume make the book more useful to those in the actual work of helping investigations of crimes by courts.

HINDU LAW, PRINCIPLES AND PRECEDENTS by N. R. Raghavachariar, Advocate, Associate Editor, The Law Weekly, Madras. Published by The Indian Law House, Mount Road, Madras. Price Rs. 8.

The second edition of Mr. Raghavachariar's Hindu Law has appeared none too soon. The first edition of the book has already won the approval of competent critics. Since the first edition, important enactments on some branches of Hindu Law have been passed by the Legislature, the most notable of which is the Hindu Women's Rights to Property Act of 1937. There has also appeared the latest edition of Mayne's Hindu Law from the pen of Mr. S. Srinivasa Iyengar which has thrown fresh light on many questions of Hindu Law. Several important decisions have been given by the various High Courts and by the Privy Council. In view of all these, Mr. Raghavachariar has had to re-write many portions of the book and add about 250 pages to it. As we observed in reviewing the first edition, the learned author has not rested content with giving references to the cases without marking his preference and giving his reasons for the same. We may notice in this connection that in dealing with the Hindu Women's Rights to Property Act, he has canvassed the view of Mr. S. Srinivasa Iyengar that the Amending Act of 1938 is *ultra vires* in so far as the succession to agricultural lands is concerned and has differed from it at pages 740 to 742 of the book, after discussing the question with reference to the rules of construction applicable to such questions and the decisions. It is needless to say that all the decisions have been noticed in their appropriate places. Two noticeable features of this edition are that new chapters have been added on the Law of Jains and the Hindu Women's Right to Property Act. We must also point to one welcome departure in this edition which is that references to all the non-official legal journals have been given of the cases referred to, so that the practitioners may not be compelled to look for any single report. We have no doubt that the book will be read with interest and profit by students, lawyers and judges.

LAW OF EVIDENCE IN INDIA AND BURMA (6th Edn.) by S. C. Sarkar, Judge, Calcutta Small Cause Court. Published by S. C. Sarkar & Sons, Ltd., College Square, Calcutta. Price Rs. 16.

Sarkar's Law of Evidence has been looked upon as one of the leading commentaries on the Indian Evidence Act and we welcome the

appearance of the sixth edition seven years after the fifth edition was published. A lengthy review of such a popular book is not called for as we had occasion to review the earlier editions and drew attention to its salient features. A number of decisions under the Act have appeared since the last edition and the learned author says that the citation in the present edition has increased by two thousand instances. A new feature of this edition is that under each section there is a synopsis given which gives references to pages in which each one of the topics referred to therein has been discussed and dealt with. We have no doubt that this edition will fully maintain the reputation of its predecessors.

THE LAW OF LOCAL BODIES IN THE MADRAS PRESIDENCY by Rao Saheb C. P. Ramachandra Rao, B.A., B.L. Published by V. S. N. Chari & Co., Nungambakkam, Madras. Price Rs. 6.

The object of this book is to impress upon the mind of the reader the fundamental principles of Local Self-Government law and to arouse a general interest in the subject. With that view the learned author has adopted a topical treatment and a narrative method of exposition of the provisions of the Madras District Municipalities Act and the Madras Local Boards Act. He has given references only to leading decisions as a fuller citation of cases will only embarrass the lay reader. The book has been divided into twelve chapters each dealing with a separate subject. We have no doubt that the book will be found useful to all persons having to deal with the subject.

CRIMINAL APPEAL & REVISION by Biswa Nath Banerjea, M.SC., B.L., Advocate, Calcutta. Published by The Law Book Company, Calcutta. Price Rs. 4.

This book collects all the learning connected with the Law and Practice of Criminal Appeals and Revisions. The matter contained in this book can be judged from the fact that the chapters deal with appeals to the Privy Council, to the Federal Court, to the High Court, to the Court of Session and to the District Magistrate. There are also chapters dealing with petitions, grounds and summary dismissal of appeals, the powers of an appellate Court, additional evidence, judgment and bail. There are also the other chapters dealing with references to the High Court, revision, further enquiry and commitment, review, appeal and revision under other Laws, limitation and court-fees. There is also a chapter dealing with *habeas corpus*, *certiorari* and *mandamus*. From the variety of subjects dealt with, it will be agreed that the book will be found helpful to lawyers, magistrates and judges.